Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(I) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgments Involving Personal, Family, or General History or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807.]

(25) *Former testimony (non-criminal action or proceeding).* Except in a criminal action or proceeding, testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment to 2012 Amendment

To conform to Federal Rule of Evidence 803(6)(A), as restyled, the language "first hand knowledge" in Rule 803(6)(b) has been changed to "knowledge" in amended Rule 803(6)(A). The new language is not intended to change the requirement that the record be made by—or from information transmitted by— someone with personal or first hand knowledge.

To conform to Federal Rules of Evidence 803(24) and 807, Rule 803(24) has been deleted and transferred to Rule 807.

Additionally, the language of Rule 803 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1994 Amendment

For provisions governing former testimony in criminal actions or proceedings, *see* Rule 804(b)(1) and Rule 19.3(c), Rules of Criminal Procedure.

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

803.013 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim's statements; court held victim's statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, primary purpose of question was to enable police assistance to meet an ongoing emergency and not to establish or prove past events for later criminal prosecution, thus victim's statement was not testimonial and admission did not violate confrontation clause.

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.014 Statements made during police interrogation under circumstances objectively indicating that there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant's son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.016 If the out-of-court statement is the functional equivalent of in-court testimony or was made under circumstances that the declarant would reasonably expect to be available at trial, it will be considered a "testimonial statement" or "testimonial evidence" and thus will not be admissible unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant's son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son's statement qualified as excited utterance; court further held son's statement was "testimonial statement" because: (1) officer

already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer's questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant's confrontation clause rights), *aff'd,* 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

803.017 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial, it will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have reasonably expected his statement to be used in a later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men jumped him and took his car; victim died before trial; court held that, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, but rather officer had found victim; officer did not know that crime had been committed, but rather was questioned victim about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

803.019 This rule allows hearsay testimony even when the declarant is available; there is still a requirement that, if the declarant is not identified, the proponent of the evidence has the burden of establishing the circumstantial trustworthiness of the statement.

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 31–33 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court noted sole evidence of declarant's personal perception was declaration itself, and further, person who related hearsay statements was

person whose vehicle had move partially into defendant's lane, thus that person had motive to shift all blame to defendant; court therefore concluded hearsay statement had insufficient trustworthiness to be admissible).

803.020 The constitutional right of confrontation is satisfied when the defendant has the opportunity to cross-examine the witness.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

803.025 If a statement falls within a firmly rooted hearsay exception, the statement is considered sufficiently reliable to satisfy the reliability requirement of the confrontation clause.

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 34–38 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane, who then related hearsay statements at trial; court concluded statement did not satisfy hearsay requirements for excited utterance, and did not have any other basis to satisfy confrontation clause, thus statement was not admissible).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 42–43 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment, "so if anything happens to me you know who was here"; neighbors heard someone knocking on victim's door and then heard victim say, "I haven't seen you in a long time"; court held this statement was admissible as present-sense impression exception to hearsay rule, and thus admission satisfied confrontation clause).

803.050 Before a statement is admissible as an exception to the hearsay rule, the proponent of the evidence must show that the declarant had an opportunity to observe, or had personal knowledge of, the fact declared.

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶ 20 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court included language that declarant must personally observe matter in question, but did not discuss that aspect further).

803.060 An out-of-court statement is not admissible merely because the declarant is available to testify at trial; such a hearsay statement is admissible only if it fits under one of the exceptions.

Keith Equip. v. Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (trial court erred in admitting hearsay statement merely because declarant was available).

Paragraph (1) — Present sense impressions.

803.1.010 A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter.

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶ 31 (2007) (because (1) medical examiner was performing autopsy, (2) medical examiner's statements described autopsy, and (3) medical examiner made statements while performing autopsy, medical examiner's statements were admissible as present sense impressions).

State v. Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 38–47 (2003) (trial court admitted as present sense impression witness's testimony that, during telephone conversation, victim said she had "just got[ten] off the phone" with defendant, that victim sounded upset and crying, and that victim had told her defendant was upset with her and was verbally abusive toward her, and that when she refused to go the defendant's house, defendant got upset and called her names; court held trial court did not abuse discretion in admitting this statement).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 16–17 (Ct. App. 2010) (trial court admitted text message from victim's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; court concluded (1) declarant perceived event, (2) statement described event, and (3) use of present tense (we "are fighting") suggested declarant sent message during fight or shortly after it, thus statement qualified as present-sense impression).

State v. Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 24–26 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing victim; two witnesses testified that, as they saw vehicles drive by, one stated, "There goes your *Fast and Furious* movie"; court held this hearsay statement was admissible as present sense impression).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 36–41 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment, "so if anything happens to me you know who was here"; two neighbors heard someone knocking on victim's door and then heard victim say, "I haven't seen you in a long time"; court held this was sufficient evidence that victim perceived the visitor prior to identifying him as "Vonnie," thus first part of statement satisfied this hearsay exception).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶ 44 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment, "so if anything happens to me you know who was here"; two neighbors heard someone knocking on victim's door and then heard victim say, "I haven't seen you in a long time"; court held this was sufficient evidence that victim perceived visitor prior to identifying him as "Vonnie," and victim's expression of concern for her own safety was sufficiently tied to event of defendant's (Vonnie's) appearance to constitute an "explanation," thus second part of statement satisfied this hearsay exception).

803.1.020 This rule requires that the event and the statement be contemporaneous to a certain degree; to what degree they have to be contemporaneous has never been specified because each case is decided on its individual facts, thus the trial court has latitude and discretion in making this determination.

State v. Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 43–47 (2003) (victim said she had "just got[ten] off the phone" with defendant; court noted this phrase might denote lapse of mere seconds, or

could mean passage of longer time; court referred to cases that held statements were present sense impression when declarant walked approximately 100 feet before making statement and when declarant made statement 23 minutes after event; court held that, because trial court observed witness while witness described declarant and statement, trial court did not abuse discretion in determining statement was sufficiently contemporaneous with event).

Paragraph (2) — Excited utterances.

803.2.003 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

* *State v. Hausner*, 230 Ariz. 60, 280 P.3d 604, ¶¶ 62–67 (2012) (for each statement, officer was one of first to arrive a scene of shooting, and one officer explained he questioned victim in order to secure scene and meet on-going emergency; each victim described where he was standing and vehicle from where shot was fired; court held each statement was excited utterance and not testimonial).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim's statements; court held victim's statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked him what happened, and he said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's question, primary purpose of question was to enable police to meet ongoing emergency and not to prove past events for later criminal prosecution, thus victim's statement was not "testimonial statement" and admission did not violate confrontation clause.

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.2.004 Statements made during police interrogation under circumstances objectively indicating that there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant's son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.2.006 An excited utterance that **was made** under circumstances that the declarant would reasonably expect to be available at trial will be considered a "testimonial statement" or "testimonial evidence" and thus must satisfy the requirements of the Sixth Amendment.

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 33–35 (Ct. App. 2006) (after declarant made 9-1-1 call, officer arrived and questioned declarant about what had happened; court held declarant would have expected these statements would be used in investigation and prosecution of defendant, thus statements were "testimonial evidence").

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant's son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son's statement qualified as excited utterance; court further held son's statement was "testimonial statement" because: (1) officer already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer's questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant's confrontation clause rights), *aff'd,* 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

803.2.007 An excited utterance that **was not made** under circumstances that the declarant would reasonably expect to be available at trial will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked him what happened, and he said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have reasonably expected his statement to be used in later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men jumped him and took his car; victim died before trial; court held, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, but rather officer had found him; officer did not know that crime had been committed, but rather was questioned him about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

803.2.010 This rule has three requirements: (1) there must be a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made soon enough after the event so that the declarant does not have time to fabricate.

* *State v. Hausner,* 230 Ariz. 60, 280 P.3d 604, ¶¶ 64–65 (2012) (officer was one of first to arrive a scene of shooting; victim described where he was standing and vehicle from where shot was fired; court held statement met three necessary requirements).

* *State v. Hausner,* 230 Ariz. 60, 280 P.3d 604, ¶¶ 66–67 (2012) (officer was one of first to arrive a scene of shooting; victim said he was in much pain and described vehicle from where shot was fired; court held statement was excited utterance).

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 20–29 (2000) (defendant drove above speed limit when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court stated either high rate of speed or accident itself could have been startling event, but hearsay statement related only to speed defendant was traveling, and because there was no evidence showing speed defendant was traveling was startling event, there was insufficient basis to admit hearsay testimony, and thus reversed conviction).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 13–17 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that victim was under stress of startling event and that statement related to startling event, thus it qualified as excited utterance; any issues of reliability went to weight of evidence, not admissibility), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 28–31 (Ct. App. 2003) (trial court admitted following statement made 30 minutes after shooting: "I got shot for no reason, but I don't want to sue; I just want this to be over").

State v. Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 18–20 (Ct. App. 1999) (trial court admitted stepmother's testimony of what victim said to her about the alleged sexual assault 45 minutes after the incident; because victim was still screaming, yelling, and crying when she made statement, trial court did not err in admitting statement).

803.2.020 A statement does not have to be contemporaneous with the startling event, but may be made after a lapse of time as long as the declarant is under the effect of the event.

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 28–31 (Ct. App. 2003) (trial court admitted following statement: "I got shot for no reason, but I don't want to sue; I just want this to be over"; although declarant made statement 30 minutes after shooting, and although declarant was less excited that he was at time of shooting, record showed he was still excited, thus trial court did not abuse discretion in admitting it).

State v. Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 18–20 (Ct. App. 1999) (trial court admitted stepmother's testimony of what victim said to her about the alleged sexual assault 45 minutes after the incident; because victim was still screaming, yelling, and crying when she made statement, trial court did not err in admitting statement).

803.2.030 A statement is inadmissible if the declarant had enough time to fabricate.

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 52–56 (2008) (paramedic remained with defendant until 1 hour after shooting; on way to hospital, defendant told paramedic that "Arturo Sandoval" had shot police officer; although shooting of police officer was startling event and words spoken related to that startling event, trial court concluded defendant had ample opportunity for conscious reflection and had so reflected; thus court concluded trial court did not abuse discretion in excluding statement).

803.2.060 An excited utterance qualifies as a firmly rooted hearsay exception, and generally any evidence that falls within such an exception for that reason alone would satisfy the reliability requirement of the confrontation clause.

Paragraph (3) — Then existing mental, emotional, or physical condition.

803.3.010 This exception allows the introduction of evidence showing the declarant's then existing state of mind.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 66–68 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent).

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 24–25 (2001) (because defendant's statement 2 days after killing that he felt threatened by victim described his prior mental state and not his then existing state of mind, it did not qualify under this exception).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 44–48 (1999) (declarant's statement showing fear of another is admissible to show declarant's later conduct).

803.3.015 The rationale for this hearsay exception rests on two assumptions: (1) declarant's statements have special reliability due to spontaneity and probable sincerity; and (2) because declarant's knowledge of his or her state of mind is inherently superior to any external, circumstantial account, there is a "fair necessity" to use those statements.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 31 (1999) (court reversed conviction because trial court admitted not just state-of-mind evidence, it also allowed admission of statements of memory or belief).

803.3.020 The purpose of this exception is to allow introduction of evidence to show that the declarant acted in accordance with the declarant's stated intention, that is, to prove the declarant's future conduct, not the future conduct of another person, although statements having some bearing on the conduct and whereabouts of another are nonetheless admissible if they relate primarily to the declarant's state of mind.

Keith Equip. v. Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (appellee claimed hearsay statement was admissible to show state of mind of person who heard statement; court held listener's state of mind was not relevant, thus trial court erred in admitting statement).

803.3.025 To be admissible under this exception, the declarant's statement must be relevant to prove the declarant's state of mind.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–63 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations because it would have shown witness's state of mind that he was aware of defendant's claims about "Paul"; court held that these were self-serving unreliable hearsay statements unrelated to the witness's state of mind).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 33 (1999) (declarant-victim's statements showed she was afraid of defendant).

803.3.030 To be admissible under this exception, the declarant's state of mind must be relevant to some issue in the proceedings.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent; defendant contended statement was inadmissible because his intent was not an issue; court held that, because defendant never raised that intent issue with trial court, defendant waived that argument on appeal).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 34 (1999) (declarant-victim's statements showed she was afraid of defendant and that she disliked him, which would have shown defendant had a motive to kill victim and would refute defendant's claim that he had a good relationship with victim).

State v. Supinger, 190 Ariz. 326, 947 P.2d 900 (Ct. App. 1997) (officer's testimony that victim's mother said she did not believe victim was hearsay, but was admissible because it showed mother's state of mind, and that state of mind was relevant because this lack of parental support might explain victim's later recantation of the molestation).

803.3.035 The state is permitted to introduce a statement showing declarant's state of mind to show the defendant's motive; not just to refute the defendant's claim of a lack of motive.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 35 (1999) (declarant-victim's statements showed she was afraid of defendant and that she disliked him, which would have shown defendant had a motive to kill victim).

803.3.040 A statement showing the declarant intended to do some act is admissible.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent).

803.3.050 This rule does not allow the admission of a statement of memory or belief, and must not include a description of the factual occurrence that produced the state of mind.

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 24–26 (2001) (defendant's statements that he and victim disrobed in back of the van, that he became angry when he could not perform sexually and victim refused to return money, that she pulled knife and defendant took it from her, and that he excised breast parts because of his anger described neither present feeling nor future intent, and were instead nothing more than asserted memory of past events, thus trial court properly precluded admission of statement as failing to satisfy requirements of this exception).

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–63 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations because it would have shown witness's state of mind that he was aware of defendant's claims about "Paul"; court held that these were self-serving unreliable hearsay statements unrelated to the witness's state of mind).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 41 (1999) (statements, "He's going to kill me," and "I'm afraid he's going to kill me," are statements of belief and not admissible).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 41 (1999) (victim's statement about conversation she heard between her mother and defendant was statement of victim's memory, and should not have been admitted).

Paragraph (4) — Statements for purposes of medical diagnosis or treatment.

803.4.010 To be admissible under this exception, (1) the declarant's motive for giving the statement must be consistent with receiving medical care, and (2) the information must be of the type upon which a physician would rely for diagnosis or treatment.

State v. Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (5-year-old victim made statements to her treating psychologist; nothing in record indicated victim's motive for making statements was other than for purpose of receiving medical care, and information concerning cause of injuries was critical to effective diagnosis and treatment).

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) (declarant's identification of who administered narcotic not reasonably pertinent to treatment, and refusal to identify narcotic showed ability to fabricate, thus reducing reliability; trial court should not have admitted statement).

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 3, 8–13 (Ct. App. 2008) (witness was registered nurse, certified inpatient obstetrics nurse, forensic nurse, and sexual assault nurse examiner; nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; court held victim's apparent motive in making statements was to receive medical care, and that it was reasonable for physician to rely on that information for diagnosis or treatment, thus statements qualified as hearsay exceptions).

803.4.015 If (1) the declarant's motive for giving the statement is consistent with receiving medical care, and (2) the information is of the type upon which a physician would rely for diagnosis or treatment, the statements qualify as a hearsay exception even if the statements were answers given in response to questions included in a sexual assault kit provided by the police.

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 8–14 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; court held victim's apparent motive in making statements was to receive medical care, and that it was reasonable for physician to rely on that information for diagnosis or treatment; court stated that, mere fact that questions might be asked routinely in sexual assault cases did not necessarily determine their admissibility as hearsay exceptions).

803.4.020 If the identity of the person who caused the injuries is relevant to proper diagnosis and treatment, then the declarant's statement of who caused the injuries is admissible.

State v. Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987) (court held that, because exact nature and extent of psychological problems that ensue from child sexual abuse often depend on identity of abuser, statement of abuser's identity was admissible, thus trial court properly allowed treating psychologist to testify that 5-year-old victim said defendant had engaged in acts of molestation).

State v. Jones, 188 Ariz. 534, 541, 937 P.2d 1182, 1189 (Ct. App. 1996) (defendant was charged with sexually abusing daughter over 10-year period when victim was from age 4 to age 14; when physician examined victim 2 weeks after she reported incidents to police, victim was reluctant to discuss details of sexual assaults, so victim wrote note in response to question of what happened; physician indicated that questions asked of victim were routine in sex abuse cases; court held that contents of note were reasonably pertinent to diagnosis and treatment, thus trial court properly admitted note stating father had molested her).

State v. Sullivan, 187 Ariz. 599, 601–02, 931 P.2d 1109, 1111–12 (Ct. App. 1996) (defendant charged with causing physical injuries (cigarette burns) to 2-year-old victim; court held that, because prevention of further abuse and facilitation of recovery apply in cases of physical abuse the same as in cases of sexual abuse, victim's statement identifying person who caused injuries would qualify as statement made for diagnosis and treatment, thus trial court properly allowed pediatrician to testify that victim said defendant caused burns on his leg).

803.4.030 If the identity of the person who caused the injuries is not relevant to proper diagnosis and treatment, then the declarant's statement of who caused the injuries is not admissible.

State v. Jeffers, 135 Ariz. 404, 418, 420–21, 661 P.2d 1105, 1119, 1121–22 (1983) (on previous occasion, victim was taken to hospital, where nurse determined victim had injuries to hand and leg, and showed symptoms of drug intoxication; nurse testified that, in response to question of what happened, victim said defendant had drugged her, that friends were coming to help kill her, and that she jumped from window to get away; nurse testified that identity of person who administered narcotic drug was not reasonably pertinent to diagnosis or treatment, thus trial court erred in admitting statement identifying defendant as person who gave drugs to victim).

State v. Reidhead, 146 Ariz. 314, 315–16, 705 P.2d 1365, 1366–67 (Ct. App. 1985) (defendant was charged with child (physical) abuse committed on his 4-year-old son; court held that identity of person who caused injury not reasonably pertinent to diagnosis or treatment, thus held that

trial court erred in allowing treating physician to testify that victim said "daddy twisted my arm"). (**Note:** It appears the Arizona Supreme Court implicitly overruled *Reidhead* because (1) dissent was of opinion that identity of person who caused injury was reasonably pertinent to diagnosis or treatment, thus trial court properly allowed hearsay statement identifying person who caused injury, and (2) Arizona Supreme Court cited with approval that dissent in *State v. Robinson,* 153 Ariz. at 199, 735 P.2d at 809.)

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 12 & n.2 (Ct. App. 2008) (nurse testified that victim told her that defendant pulled her shirt over her head so she was unable to see her attacker; assuming this statement was not relevant to medical treatment, any error was harmless because victim testified at trial and told same thing to jurors).

803.4.040 Statements of a victim of a sexual assault made to a psychiatrist, psychologist, or counselor in the course of treatment resulting from the assault are admissible.

State v. Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (trial court properly allowed treating psychologist to testify that 5-year-old victim said defendant had engaged in acts of molestation).

State v. Rushton, 172 Ariz. 454, 456, 837 P.2d 1189, 1191 (Ct. App. 1992) (trial court properly admitted victim's statements to social worker during mental health treatments and counseling).

803.4.050 The person receiving the statements of a victim of a sexual assault does not have to be a licensed or certified counselor or physician as long as the statements were made in the course of treatment and counseling that was a result of the assault.

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 15–16 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; defendant contended statements did not qualify as hearsay exception because they were never forwarded to physician; court noted that nurse provided treatment, thus it did not matter if no physician was involved).

State v. Rushton, 172 Ariz. 454, 457, 837 P.2d 1189, 1192 (Ct. App. 1992) (although social worker was not licensed or certified, she was authorized to counsel victims of sexual assaults).

Paragraph (5) — Recorded recollection.

803.5.005 In order to be admissible under this exception, the requirements are: (1) the declarant (a) once had knowledge of the event, (b) now has insufficient recollection to testify fully and accurately, and (c) made or adopted the statement when the matter was fresh in the declarant's memory; and (2) the statement correctly reflects the declarant's knowledge.

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 29–30 (2007) (detective testified he (a) wrote in his report what medical examiner said during autopsy, (b) now had insufficient recollection of details of autopsy, (c) wrote his report while medical examiner was performing autopsy, (d) reviewed report for accuracy, and (e) adopted report by signing it; report was thus admissible as recorded recollection).

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶ 12 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could remember details of one incident; for other incident, victim testified she could not remember it, but she remembered talking to "a lady" to whom she told "the truth"

at time when she could better remember "some other stuff that happened with [Defendant]," and detective testified videotape accurately reflected forensic interview he observed; court held this met foundational requirements of rule).

Goy v. Jones (State), 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet requirements of Rule 803(5), report is admissible, but only to extent report may be read in evidence).

803.5.007 When a witness testifies and is subject to cross-examination, any statement that witness made is admissible and its admission does not violate the confrontation clause.

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.").

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 16–20 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could not remember details of one incident, so trial court had videotape played to jurors; defendant contended interviewer's statements in videotape were testimonial, and because interviewer did not testify, that violated his right to confront witnesses; court noted interviewer only asked questions and at times requested clarification, but did not repeat statements made by others or recount any other information that might have implicated defendant, thus what interviewer said was not testimonial hearsay; court held no violation of right of confrontation).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 3–8 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement to police; because victim was present and subject to cross-examination, admission of her out-of-court statement did not violate confrontation clause).

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held that, because officer testified and was subject to cross-examination, admission officer's testimony did not violate Sixth Amendment).

803.5.015 There is no requirement that the memorandum be made by or at the direction of the declarant; what is necessary is that the declarant (1) once had knowledge of the event, (2) now has insufficient recollection to testify fully and accurately, and (3) made or adopted the statement when fresh in the declarant's memory, and if the declarant did not make or adopt the memorandum, that the person who did make the memorandum made an accurate account of what the declarant said.

State v. Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 10 (Ct. App. 1998) (8-year-old victim testified she remembered events more clearly when she spoke to detective than she did at time of trial and her memory had since diminished, and that she spoke truthfully to detective and told him everything she remembered at time; detective testified that tape-recording was accurate recording of victim's statement and that transcript of recording was accurate as well; trial court properly admitted victim's recorded statements).

803.5.016 In order to refresh a witness's recollection with a recording, the witness should listen to the recording outside of the presence of the jurors; if the witness's recollection is refreshed, the witness may then testify; if the witness's recollection is not refreshed, the party may then seek to have the recording admitted under Rule 803(5).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 8 & n.2 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; to extent trial court allowed tape to be played in presence of jurors, trial court erred, but because recorded statement impeached her testimony, any error in playing of recording was harmless).

803.5.017 If a memorandum or record is admissible under this rule, the memorandum or record may be read in evidence, but the memorandum or record may not itself be received as an exhibit unless the adverse party offers it.

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 13–15 (Ct. App. 2010) (trial court ruled videotape of forensic interview of 5-year-old victim was recorded recollection and played it to jurors during trial over defendant's objection; in response to question from jurors, trial court and parties agreed jurors would be able to review videotape during deliberations; on appeal, defendant contended trial court erred in allowing videotape to be admitted in evidence so it was available to jurors during deliberations; because defendant did not object at trial, court reviewed for fundamental error only; court held defendant failed to prove jurors reviewed videotape during deliberations, and further held that, even if jurors did view videotape during deliberations, other evidence supported his conviction, thus defendant failed to establish prejudice).

State v. Ortega, 220 Ariz. 320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

Goy v. Jones, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet the requirements of Rule 803(5), the report is admissible, but only to extent report may be read in evidence; court noted that Rule 803(8) would preclude admission of report itself, but that Rule 803(5) allows admission of report if opposing party offers it in evidence).

803.5.040 This rule is not limited to written materials, thus a videotape may qualify as a recorded recollection.

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 10–11 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could remember details of one incident but not of other incident; trial court played for jurors videotaped interview where victim described other incident; court rejected defendant's contention that Rule 803(5) is limited to written material).

Paragraph (6) — Records of regularly conducted activity.

803.6.010 This exception allows for admission of a memorandum, report, record, or data compilation if made at or near the time of the underlying event.

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (because report of theft was made 2 months after theft, which was not customary, and was not on business's official incident report form, it did not qualify as a business record).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (technician who conducted calibration checks on Intoxilyzer 5000 recorded results at or near time of tests).

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (defendant-seller sought to introduce December memorandum of conversations; although some testimony indicated conversation took place in summer or fall, other testimony indicated it took place as early as May; court held that trial court did not abuse discretion in concluding memorandum was not made at or near time of conversations).

803.6.020 This exception allows for admission of a memorandum, report, record, or data compilation if the information is either compiled or transmitted by someone with firsthand knowledge.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶ 12 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; defendant contended records were inadmissible because former jail supervisor testified only that "booker" was "Mr. Kent"; jail supervisor testified about booking process and how such receipts were created in normal course of business at jail, and who bookers were and how they processed inmates; court concluded trial court did not abuse discretion in finding jail supervisor provided sufficient information for admission of business records).

803.6.040 This allows for admission of a memorandum, report, record, or data compilation if made and kept entirely in the course of a regularly conducted business activity.

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (because report of theft was made 2 months after theft, which was not customary, and was not on business's official incident report form, it did not qualify as a business record).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (regulation required that each Intoxilyzer 5000 undergo calibration checks every 31 days and that person doing calibration and maintenance test complete affidavit listing results of tests).

Taeger v. Catholic Fam. & Com. Serv., 196 Ariz. 285, 995 P.2d 721, ¶ 43 (Ct. App. 1999) (because plaintiffs were able to establish only they received documents in course of litigation, this was not sufficient to establish they were made and kept in course of a regularly conducted business).

803.6.060 For records to be admissible under this exception, the requirements of this rule must be shown by testimony of the custodian of records or another qualified witness, who need not be an employee of the entity that prepared them.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 5–10 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; former jail supervisor testified about booking process and how such receipts were created in normal course of business at jail; court concluded trial court did not abuse discretion in finding jail supervisor was qualified witness for business records purpose).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (affidavit listing results of calibration checks was made by person doing calibration and maintenance tests).

Taeger v. Catholic Fam. & Com. Serv., 196 Ariz. 285, 995 P.2d 721, ¶ 41 (Ct. App. 1999) (plaintiffs attempted to establish foundation by testimony of someone who was not defendant's employee, but that person could not testify whether records were kept in regular course of defendant's business).

803.6.070 If a business record contains a further hearsay statement, the business record is admissible as long as the hearsay statement was made by a person acting in the routine course of the business; if not, the record is not admissible unless the hearsay statement itself is admissible under some exception.

Taeger v. Catholic Fam. & Com. Serv., 196 Ariz. 285, 995 P.2d 721, ¶ 38 (Ct. App. 1999) (plaintiffs offered in evidence minutes of defendant's board meeting, which contained statements of persons; court noted plaintiffs would have had to show that statements within minutes were either business records themselves, or else satisfied some other hearsay exception).

803.6.090 Evidence that meets the foundational requirements is subject to exclusion if the source of the information or the method or circumstances of the preparation indicate a lack of trustworthiness, or to the extent that portions of the evidence lack an appropriate foundation.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 9–11 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; court noted source of identifying information was defendant himself, and so it should be reliable).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 28–31 (Ct. App. 2006) (defendant contended MVD records were not reliable because custodian of records did not know who had retrieved records or level of training of person who had retrieved them, did not know how many people had input access to MVD computers, and did not believe that there was any one person responsible for determining accuracy of records; court noted that custodian of records had been employed at MVD for 17 years and had been custodian of records for 10 years, that she had followed statutory requirements for admission of records, and that she was "100 percent confident" that information in records was accurate; court held trial court did not abuse discretion in admitting MVD records).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 19–20 (Ct. App. 2006) (defendant contended that affidavit of results of calibration and maintenance tests on Intoxilyzer 5000 was not trustworthy because affidavits were produced by state for state's prosecution of defendant; court noted that maintenance records contain only factual memorializations generated by scientific machine and not opinions of person doing tests, and because person doing testing had no interest in whether information was favorable or adverse to defendant, records were trustworthy).

Larsen v. Decker, 196 Ariz. 239, 995 P.2d 281, ¶¶ 18–26 (Ct. App. 2000) (plaintiff brought action for damages resulting from automobile accident; because plaintiff failed to present evidence that treatment reflected in medical records and bills was for injuries from the automobile accident, trial court properly excluded medical records and bills).

Paragraph (7) — Absence of entry in records kept in accordance with the provisions of paragraph (6).

803.7.010 Evidence that a company has a procedure for reporting certain events, and that there is no record of a certain event is admissible to show that either the event did not happen or it is not of the type required to be reported.

Mohave Elec. Coop. v. Byers, 189 Ariz. 292, 942 P.2d 451 (Ct. App. 1997) (because company required reporting of business expenses, and because there was no stated business purpose for 1,157 credit card transactions, this created factual question that should have precluded summary judgment).

Paragraph (8) — Public records and reports.

803.8.005 The retention and production of public records is not the type of evil that the confrontation clause intended to avoid, thus public records are not "testimonial evidence."

State v. Bennett, 216 Ariz. 15, 162 P.3d 654, ¶¶ 1–8 (Ct. App. 2007) (court held affidavit authenticating record of prior conviction was not "testimonial evidence").

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 15–27 (Ct. App. 2006) (court held that record of prior convictions was not "testimonial evidence").

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 12–18 (Ct. App. 2006) (court held record of calibration and maintenance test of intoxilyzer was not "testimonial evidence").

803.8.033 This exception allows for admission of records, reports, statements, or data compilations of matters when there is a duty imposed by law to observe and report those matters.

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 25–31 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); before trip from Baltimore to Phoenix, they obtained instructions from Southwest Airlines (SWA) on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested because they were not law enforcement officers; plaintiffs sued SWA claiming it was negligent in actions that led to their arrest; court held trial court properly admitted three FBI reports about this incident drafted by special agent R.S. because they reflected matters R.S. observed or heard and reported pursuant to his FBI duties; court rejected SWA's claim that these were merely preliminary reports and thus should not have been admitted).

803.8.035 This exception does not allow admission of reports of matters observed by police officers or other law enforcement personnel acting in an adversarial setting.

Goy v. Jones, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet the requirements of Rule 803(5), the report is admissible, but only to extent report may be read in evidence; court noted that Rule 803(8) would preclude admission of report itself, but that Rule 803(5) allows admission of report if opposing party offers it in evidence).

State v. Meza, 203 Ariz. 50, 50 P.3d 407, ¶ 20 (Ct. App. 2002) (in aggravated assault charged as result of driving under influence, defendant sought records of all calibration checks and standard quality assurance procedure ("SQAP") tests performed on Intoxilyzer 5000 unit used for defendant; court held, although information was in possession of Phoenix Police Department Crime Laboratory rather than prosecutor's office, law enforcement agency investiga-

ting criminal action operates as arm of prosecutor for purposes of obtaining information that falls within required disclosure provisions of Rule 15.1, thus state should have disclosed calibration check test results deleted from computer main file).

803.8.040 Although this exception does not allow admission of reports of matters observed by police officers or other law enforcement personnel acting in an adversarial setting, this limitation does not apply to police or law enforcement personnel acting in routine, non-adversarial situations.

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 36–39 (Ct. App. 2006) (report of calibration and maintenance is not result of investigating particular crime and is instead routine task removed from adversarial setting, thus information is not precluded by Rule 803(8)(B)).

State v. Best, 146 Ariz. 1, 3–4, 703 P.2d 548, 550–51 (Ct. App. 1985) (police report stating certain fingerprints came from certain items would be admissible under this exception).

803.8.045 This rule allows for admission of records, reports, statements, or data compilations of factual findings resulting from investigation made pursuant to authority granted by law.

Shotwell v. Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶ 28 (2004) (court rejected position that EEOC determination letter is automatically admissible in Title VII employment discrimination lawsuit, and held instead admissibility is controlled by Ariz. R. Evid.; court held EEOC letter is admissible hearsay).

Bogard v. Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Ariz. R. Evid.; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

803.8.050 This exception allows admission of both the factual findings resulting from an investigation and the opinions and conclusions of the investigator as long as they are based on the factual investigation and satisfy the rule's trustworthiness requirement.

Shotwell v. Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 31–32 (2004) (court stated document is not necessarily inadmissible merely because it contains conclusions or is conclusory).

Larsen v. Decker, 196 Ariz. 239, 995 P.2d 281, ¶¶ 9–13, 17 (Ct. App. 2000) (plaintiff brought action for damages resulting from automobile accident; trial court excluded Social Security Administration (SSA) report finding plaintiff permanently disabled because it concluded SSA proceedings were essentially *ex parte*, ALJ was not qualified as medical expert, and none of plaintiff's treating doctors testified, thus report was not sufficiently reliable; court adopted rule that allowed for admission of opinions and conclusions in addition to factual findings in a report, but held trial court properly excluded report based on trial court's conclusion that report was not reliable (trustworthy)).

State ex rel. Miller v. Tucson Assoc. Ltd. Partnership, 165 Ariz. 519, 799 P.2d 860 (Ct. App. 1990) (expressly overrules *Ferguson v. Cessna Aircraft Co.*).

Ferguson v. Cessna Aircraft Co., 132 Ariz. 47, 643 P.2d 1017 (Ct. App. 1981) (expert witness relied upon factual data in report to arrive at his conclusions, but did not rely upon any opinions or conclusions contained in report).

803.8.060 This exception allows admission of the factual findings resulting from an investigation, but does not allow for the admission of the opinions and conclusions of the investigator.

Davis v. Cessna Aircraft Corp., 182 Ariz. 26, 893 P.2d 26 (Ct. App. 1994) (this holding appears to be in direct conflict with *State ex rel. Miller v. Tucson Assoc. Ltd. Partnership*, 165 Ariz. 519, 520, 799 P.2d 860, 861 (Ct. App. 1990)).

803.8.070 The trial court may exclude records, reports, statements, or data compilations of public offices or agencies if the sources of information or other circumstances indicate lack of trustworthiness.

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 32–34 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); before trip from Baltimore to Phoenix, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; court held trial court did not abuse discretion in concluding FBI reports were trustworthy because (1) they contained relatively straightforward information (customer service agent was on vacation and not available for interview and that messages were left for agent's supervisor), (2) SWA security representative had noted information on SWA form that corroborated reports, (3) FBI agent who prepared reports had no motive to lie, and (4) another FBI agent had approved reports).

803.8.080 As long as the sources of information or other circumstances indicate trustworthiness, any errors or defects in records, reports, statements, or data compilations of public offices or agencies go to the weight and not the admissibility of the documents.

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶ 33 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to their arrest; court held, because sources of information and other circumstances indicate trustworthiness of FBI reports, length of time between event and report (nearly 7 weeks), lack of full explanation, misspellings, and ambiguities in reports went to weight and not the admissibility of reports).

Paragraph (19) — Reputation concerning personal or family history.

803.19.010 Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, about a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history is admissible as a hearsay exception.

State v. May, 210 Ariz. 452, 112 P.3d 39, ¶¶ 11[14 (Ct. App. 2005) (defendant charged with DUI with person under 15 in vehicle; officer testified that man at scene said he was defendant's brother and that person in vehicle was his 13-year-old son; court held statement was offered to

prove truth of matter asserted and thus was hearsay; court noted there was no showing officer knew anyone in 13-year-old's family, and held officer was not sufficiently familiar with 13-year-old for officer's testimony to be admissible under this exception).

Paragraph (22) — Judgment of previous conviction.

803.22.005 Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, is admissible to prove any fact essential to sustain the judgment,

Picaso v. Tucson Unif. S.D., 217 Ariz. 178, 171 P.3d 1219, ¶ 7 (2007) (plaintiff's guilty plea in criminal case was admissible in civil case).

803.22.020 Under A.R.S. § 13–807, a defendant is estopped from denying the commission of the acts forming the basis for the conviction.

American Family Mutual Ins. Co. v. White, 204 Ariz. 500, 65 P.3d 449, ¶¶ 15–16 (Ct. App. 2003) (to stop White from assaulting smaller person, Travis hit White in head with metal pipe; state charged Travis with aggravated assault dangerous; to avoid mandatory prison, Travis pled guilty to non-dangerous aggravated assault; White sued Travis and his parents (the Wildes); Wildes' insurance carrier, American Family (AmF), brought declaratory judgment action and moved for summary judgment contending White's claim against AmF was barred by provision in policy precluding coverage if any insured violated criminal law; trial court held White stood in shoes of Travis, and because Travis was precluded from collecting from AmF, White was precluded from recovering, and thus granted summary judgment for AmF; White contended that, despite plea of guilty in criminal action, Travis should be allowed in civil action to claim he was acting in self-defense or defense of third person; court held A.R.S. § 13–807 precluded Travis from denying he violated criminal law, which would thus preclude Travis from collecting from AmF, and this precluded White from recovering from AmF).